

## RELOCATE GTMO DETAINEES TO STAND TRIAL IN THE UNITED STATES

BY

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# USAWC STRATEGY RESEARCH PROJECT

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## **ABSTRACT**

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One element of President Obama's strategic vision is to close down the detention center at Guantanamo Bay, Cuba and relocate all detainees to the United States for prosecution. The President and the Justice Department claim that the legal processes for trying detainees from the Global War on Terrorism are unconstitutional and inconsistent with the national security and foreign policy interests of the U.S., and are not in the best interest of justice. Trying detainees in the Federal Court system Under Article III of the U.S. Constitution has provided some challenges for prosecutors and may possibly degrade national security. Additionally, the Federal Court under the Article III system does not possess a proper mix of expertise in military law and criminal law respectively and is not suitably outfitted to balance the fragile stability of military law, criminal law, intelligence needs, and human rights obligations. However a hybrid court system called the *National Security Court System* (NSCS) could be implemented and would provide the proper mixture of the military law model and the criminal law model with duty expert Judges, prosecution and defense teams that will have a full understanding of military law, criminal law, intelligence needs, and human rights obligations.





## RELOCATE GTMO DETAINEES TO STAND TRIAL IN THE UNITED STATES

GTMO used to be a symbol of hope for human rights on the southeastern tip of communist Cuba. Now GTMO has become a focal point of disapproval both domestically and internationally. These alleged acts of civil rights violations, torture and inhumane treatment has now become a —terrorist tool for recruitment” and has received severe criticism.<sup>1</sup> Over the last eight years, the military commissions originally ordered by President Bush in 2001, and the detention facility at GTMO, Cuba has been under intense investigation and condemnation regarding law, policy and inhumane treatment.

On 22 January 2009, President Obama signed three executive orders:

(1) The closure of the detention facility as soon as practical, and no later than 22 January 2010. It also halts (at least temporarily) all proceedings before military commissions; (2) limiting methods for interrogations of persons in U.S. custody to those listed in the Army Field Manual on Human Intelligence Collector Operations. Although it provides an exception for interrogations by the FBI, stating that the FBI may continue to use authorized, non-coercive techniques of interrogation that are designed to elicit voluntary statement and do not involve the use of force, threats, or promises; (3) establish the Special Task Force on Detainee Disposition, which is tasked with identifying lawful options for the disposition of Guantanamo detainees and others captured by the United States.<sup>2</sup>

On 20 May 2009, in a bi-partisan vote, Congress denied the \$80 million required by President Obama in order to close the GTMO facility and open other facilities in the U.S.<sup>3</sup> On 21 May 2009, President Obama replied to the lack of political support to close down GTMO and provided a moving speech, —Protecting our Security and Our Values.” President Obama voiced his concern that the U.S. had crossed the line by violating basic human rights in the war on terrorism and stated, —These actions at

GTMO have been a focal point for international criticism and a recruiting tool for terrorists.”<sup>4</sup>

The President presented a comprehensive approach for dealing with GTMO’s detainees: (1) diplomatic repatriation; (2) use of federal courts under Article III to try some; (3) and use of military commissions to try some.”<sup>5</sup>

Currently, all military commission hearings are placed on hold by President Obama. While President Obama’s comprehensive approach may sound appealing, the question remains how President Obama can execute these three options without designing and assembling an institution of fair justice, while preserving U.S.’s national security?

This paper will argue that there is one system that would be a suitable mixture of both the military law approach and the law enforcement approach.<sup>6</sup> This system is called the National Security Court System (NSCS).<sup>7</sup> The NSCS is suitably outfitted to ~~correctly~~ assess and understand the fragile stability of military law, intelligence needs, human rights obligations, and the need for justice in this hybrid war.”<sup>8</sup> The NSCS system would be separate from existing Article III federal courts and military commission process.<sup>9</sup> These Article III hybrid courts would co-exist with the traditional federal courts, the military commissions, and the courts-martial system.<sup>10</sup>

This paper will provide a historical review of the issue, reveal some of the legal issues associated with detainees, and provide a suitability, feasibility and acceptability analysis in order to evaluate three separate national policies that President Obama could execute for the detention and prosecution of current and future GTMO detainees.

## History of GTMO

The U.S. Naval Base, in Guantanamo Bay, Cuba is the oldest overseas U.S. military base and the only one located in a communist country. It is located in the southeast portion of Cuba called the Orient Province. It is roughly 45 square miles and 400 miles from Miami, Florida.<sup>11</sup> Its terrain is bordered by steep and rugged cliffs, which provides an advantageous defensive position against attack. The Joint Task Force (JTF) GTMO is a tenant organization at U.S. Naval Base, GTMO. The JTF is comprised of roughly 2,500 soldiers, Sailors, Marines, Coast Guard and Airmen and is commanded by a one star Army General.

The Spanish American War launched the U.S.'s initial occupation on GTMO in 10 Jun 1898 with the arrival of one Marine Battalion.<sup>12</sup> Years later in 1903, the Cuban-American Treaty was established, granting the U.S. the lease of GTMO for \$2,000 a month.<sup>13</sup> This agreement was established for the use of coaling and naval stations only and for no other purposes.<sup>14</sup> In 1934, the Treaty was re-negotiated for the lease to be indefinite and that Cuba will provide all lifeline support and supplies to GTMO unless both the U.S. and Cuba agreed to dissolve it.<sup>15</sup> In 1964, the new Castro regime decided that the Treaty was coerced by the U.S. and would no longer be recognized by Cuba. Castro cut off all life line support and supplies to GTMO, forcing the U.S. to construct its own infrastructure and provide supplies to make GTMO self-sufficient.<sup>16</sup> In 1959, Castro stated that GTMO should be returned to Cuba triggering restrictions that all U.S. personnel will remain in GTMO only and will not enter Cuban territory.<sup>17</sup>

## How GTMO Became a Prison

GTMO's first use as a detention facility was in 1991 after the overthrow of President Jean Bertrand Aristide.<sup>18</sup> George H. W. Bush ordered the construction of tent

shelters for thousands of Haitians fleeing the military dictatorship.<sup>19</sup> This “tent city” named Camp Bulkeley was enclosed by barbed wire and secured by military personnel.<sup>20</sup> In June 1993, all refugees were returned to Haiti except 300 HIV positive refugees and their relatives who remained detained at Camp Bulkeley.<sup>21</sup>

This crowded and unhealthy environment became the origin for domestic and international dissent of inhumane treatment at GTMO.<sup>22</sup> A federal judge ordered the closure of Camp Bulkeley calling it, “nothing more than an HIV prison camp, where surrounded by razor barbed wire and subjected to pre-dawn military sweeps; people lived under continual threat of abuse by 400 soldiers in full riot gear.”<sup>23</sup> However, later thousands of Haitians again were detained at GTMO due to more uprisings in that fragile nation state.<sup>24</sup>

At the same time, Operation Sea Signal began and GTMO stood up JTF-160, which provided humanitarian assistance to over 50,000 Cuban immigrants attempting to flee to the U.S. and awaiting repatriation back to Cuba.<sup>25</sup> Again, the conditions were very poor leading to suicides and disorder within the tent city.<sup>26</sup> Riots were the norm, battled back by U.S. troops in full riot gear with “fixed bayonets”.<sup>27</sup> Some Cubans even succeeded in scaling razor wire attempting to re-enter back to Cuba or climbing down 40-foot cliffs attempting to swim a mile back to Cuba.<sup>28</sup> In January 1995, the Eleventh Circuit Court of Appeals in Atlanta ruled that, “detainees at Guantanamo could be forcibly repatriated because constitutional rights bind the government only when the refugees are at or within the borders of the U.S.”<sup>29</sup>

### Judicial Review

—On the same day that the Executive Order to close the Guantanamo detention facility was issued, President Obama issued two other Executive Orders which created

separate task forces—the Special Task Force on Detainee Disposition and the Special Task Force on Interrogation and Transfer Policies—charged with reviewing aspects of U.S. detention policy, including the options available for the detention, trial, or transfer of wartime detainees, whether held at GTMO or elsewhere.”<sup>30</sup> The Special Task Force on Detainee Disposition will place all detainees in one of the three categories.<sup>31</sup>

(1) The detainees should continue to be held by the United States (preventive detention); (2) be prosecuted by the United States for criminal offenses, or (3) transferred or released to a third country.<sup>32</sup>

But this poses serious questions, and as what criteria would the detainees be tried under for Military Commissions or the Federal Courts? Can the Federal Court system under Article III effectively try such cases that involve such a dynamic and complex set of laws and values and is it correct forum to handle such cases of national security now and into the future? The quote below depicts how successful the Federal Court system has been in the past.

On Tuesday, January 25, 2011, U.S. District Judge Lewis A. Kaplan, the presiding judge in the case, sentenced Ahmed Ghailani, 36, to life in prison for the bombing, stating that any sufferings Ghailani experienced at the hands of the CIA or other agencies while in custody at Guantanamo Bay pales in comparison to the monumental tragedy of the bombings of the U.S. embassies in Kenya and Tanzania in 1998, which killed 224 people, including 12 Americans, and left thousands injured or otherwise impacted by the crimes. The attacks were one of the deadliest non-wartime incidents of international terrorism to affect the United States; they were on a scale not surpassed until the September 11, 2001 terrorist attacks three years later.<sup>33</sup>

Ahmed Ghailani is the fifth person to be sentenced. Four others were sentenced to life in prison in a 2001 trial in Manhattan federal court.<sup>34</sup>

The definition of the U.S. Federal Court under Article III refers to:

Article Three of the United States Constitution establishes the judicial branch of the federal government. The judicial branch comprises the

Supreme Court of the United States and lower courts as created by Congress. Article III Courts consist entirely of certain federal courts. These courts are the Supreme Court of the United States and the inferior courts established by the Congress, which currently are the 13 United States courts of appeals, the 94 United States district courts, and the U.S. Court of International Trade. They constitute the judicial branch of the government (which is defined by Article III of the Constitution).<sup>35</sup>

Under the Constitution, Congress can vest these courts with jurisdiction to hear cases involving the Constitution or federal law and certain cases involving disputes between citizens of different states or countries. Article III includes provisions to protect the courts against influence by the other branches of government: judges may not have their salaries reduced during their tenure in office, and their appointment is for life (barring impeachment and removal for bad behavior).<sup>36</sup>

Currently there have been five detainees tried in U.S. Federal Court under the Article III Rights and all five detainees have been sentenced to life. However, the U.S. cannot afford to risk the possibility that future detainees will be found innocent by a system that is not suitably designed to manage and synthesize the complexity of constitutional rights for terrorists. It is difficult for a civilian court to ~~—assess~~ and understand the fragile stability of military law, intelligence needs, human rights obligations, and the need for justice in this hybrid war.”<sup>37</sup>

This case (Ahmed Ghailani) highlighted the challenges of affording full constitutional protections to terrorism suspects who were once held in secret detention overseas and subjected to harsh interrogation tactics by US intelligence officials.<sup>38</sup>

Administration critics cited the shaky, one-count verdict as proof that Al Qaeda suspects should face trial at Guantánamo rather than in US courts. Others analysts have pointed to the Ghailani verdict as an example of the resilience and essential fairness of the US justice system.<sup>39</sup>

US District Judge Lewis Kaplan, the judge in Ghailani’s case stated that he,

Rejected requests by defense lawyers for leniency in recognition of Ahmed Ghailani’s alleged mistreatment during harsh US interrogations. Instead, the judge imposed the maximum sentence on the 36-year-old Tanzania national. Whatever the level of Ghailani’s suffering, it ~~—ples~~ in comparison to the suffering and the horror he and his confederates

caused,” the judge told a packed Manhattan courtroom, according to the Associated Press.<sup>40</sup>

The sufferings Judge Kaplan was referring to is the alleged torture and being detained for years before being tried. Though Judge Kaplan’s statement is palatable to most Americans, it suggests an equivalent retaliation “Tit-for-Tat” philosophy versus a legal philosophy. This can be very dangerous, because in future trials other judges can put the equivalent retaliation philosophy aside and focus strictly on the law. Judges in federal courts generally have no experience in correctly ~~assessing~~ assessing and understanding the fragile stability of military law, intelligence needs, human rights obligations, and the need for justice in this hybrid war.”<sup>41</sup>

In addition to the alleged torture of detainees, there have been complaints of violating the detainee’s ~~writ~~ “writ of habeas corpus” rights—detainees held at GTMO for years ~~on~~ “preventive detention”, and have not either been released or put on trial.

The definition of the habeas corpus rights is:

A writ of habeas corpus is a summons with the force of a court order, addressed to the custodian (a prison official for example) demanding that a prisoner be taken before the court, and that the custodian present proof of authority, allowing the court to determine if the custodian has lawful authority to detain the person. If the custodian does not have authority to detain the prisoner, then he must be released from custody. The prisoner, or another person acting on his or her behalf, may petition the court, or a judge, for a writ of habeas corpus.<sup>42</sup>

One possible solution for the U.S. to overcome the writ of habeas corpus argument is to establish a new policy or law that all detainees placed in ~~on~~ “preventive detention” must be ~~released~~ released upon the cessation of hostilities and will not have habeas corpus rights.”<sup>43</sup> It must be conveyed that this is in the best interest of national security and is conforming to the ~~no~~ “non-traditional warfare” of the twenty-first century-hybrid war. Additionally, there have been no known cases thrown out due to violating any

detainee's habeas corpus rights, which concludes that this right does not pertain for possible international terrorists.

The following sections provide three separate policies for the detention and prosecution of current and future detainees at GTMO. The three separate policies are; (1) Resurrect the Military Commissions at GTMO; (2) Combination of Federal Court, Release to a Third Country or Military Commissions and; (3) Create a National Security Court System. Granted all three options are viable, yet some come with more risk than others to domestic and international criticism and the interest of U.S. national security. These options also vary with the legal systems' ability to cope with today's armed conflict of the twenty-first century, shattering all previous notions of —~~an~~ additional warfare".<sup>44</sup>

- **OPTION 1: RESURRECT THE MILITARY COMMISSIONS AT GTMO**

From President Bush's policy standpoint, the U.S. facility at Guantanamo offered a safe and secure location away from the battlefield where captured persons could be interrogated and potentially tried by Military Commissions for any war crimes they may have committed.

#### Suitability

President Obama can direct and institute strict oversight of the legal process and treatment of all detainees at GTMO by implementing —~~check~~s and balances" using the Attorney General's Office and Non-governmental Organizations to regularly inspect and report all violations of inhumane treatment.<sup>45</sup> Additionally, by incorporating both the Special Task Force on Detainee Disposition and the Special Task Force on Interrogation and Transfer Policies, the oversight will ensure the process is



constitutional and consistent with the national security and foreign policy interest of the U.S. and the interest of justice.<sup>46</sup>

### Feasibility

- It is still feasible to try detainees at GTMO, because there have been several cases which have convicted detainees in the past. If needed, the Federal Courts can provide federal judges in lieu of military judges to eliminate the perception of military influence —“conflict of interest”.
- Hold the —“preventive detainees” in separate facilities; keeping them away from detainees that may be released or awaiting trial. This prevents interaction between the three categories of detainees and eliminates potential recruits.
- GTMO can continue to release detainees per the current criteria process.
- There should be several cases being tried concurrently to ensure trials are executed in a timely manner.
- All supporting efforts are currently located at GTMO, which allows the process to resume quickly and efficiently by implementing stricter guidance, direction and civilian oversight.
- GTMO is a suitable location; it is an isolated and secure area containing numerous hard structures coupled with a well-trained and experienced security force.
- GTMO’s location will attract less media coverage than in the U.S.
- U.S. citizens will feel safer if trials were conducted at GTMO, rather in their own cities, thus eliminating potential terrorist incidents by extremists or protestors.

## Acceptability

The domestic and international community will be less likely to oppose resurrecting the Military Commissions at GTMO once they have witnessed several institutional changes including Attorney General and other civilian oversight in the legal process. Both legal and policy changes are consistent with the national security and foreign policy interests of the U.S. and the interest of justice. President Obama's request for the \$80 million for construction of new facilities in the U.S. will not be required and the \$100s of millions currently invested in GTMO detention facilities will continue to support the global war on terrorism (GWOT) mission.

## Risks

If GTMO remains open, this will contradict President Obama's promise to the domestic and international community that GTMO would be shut down. The entire world may lose faith in President Obama's promises and it may appear that he accepts the perception or reality of unlawful detention and inhumane treatment. The further away this detention facility is from the continental United States, the greater risk of the U.S. —“out of sight-out of mind” mentality, creating domestic and international cynicism towards the President and the U.S.

- **OPTION II: COMBINATION OF FEDERAL COURT, RELEASED TO THIRD COUNTRY OR MILITARY COMMISSIONS**

This is President Obama's current policy, yet it is still in its infant stages with numerous decisions and procedures which must be addressed. This option can be a solution for our legal processes to meet the constitutional requirements and stay consistent with national security and foreign policy interest. President Obama's Executive Order requires that —any persons who continue to be held at Guantanamo at

the time of closure are to be transferred to a third country for continued detention, released or transferred to another U.S. detention facility.”<sup>47</sup>

President Obama mandated in his Executive Orders the creation of a separate task force. The Special Task Force on Detainee Disposition will review all GTMO detainees’ cases and determine one of three actions; (1) the detainees should continue to be held by the United States; (2) be prosecuted by the United States for criminal offenses, or (3) transferred or released to a third country.”<sup>48</sup> There have been approximately 800 detainees transferred to GTMO since 2002.<sup>49</sup> The United States has transferred over seventy-three percent (585) of the detainees held at GTMO.<sup>50</sup> The remaining 215 fall into three categories:

- Category 1 Persons who have been placed in preventive detention to stop them from returning to the battlefield. Preventive detention of a captured belligerent is non-penal in nature, and must be ended upon the cessation of hostilities.<sup>51</sup>
- Category 2 Persons who besides being subject to preventive detention, have been brought or are expected to be brought before a military or other tribunal to face criminal charges, including for alleged violation of the law of war. If convicted, such persons may be subject to criminal penalty, which in the case of the most severe offenses may include life imprisonment or death.<sup>52</sup>
- Category 3 Persons who have been cleared for transfer or release to a foreign country, either because (1) they are not believed to have been engaged in hostilities, or (2) although they were found to have been enemy belligerents, they are no longer considered a threat to U.S. security. Such persons remain detained at GTMO until their transfer may be effectuated.<sup>53</sup>

### Suitability

Currently, Category 1 (preventive detention) will be the biggest challenge and the U.S. must decide quickly on how to handle these detainees to ensure President Obama’s order is complied with. Holding —“preventive detention” detainees in U.S. state/federal prisons or military correctional facilities in order to stop them from returning

to the battle field is very suitable. This option ensures the safety and security of the U.S. forces and civilians domestically and internationally. As mentioned earlier in the paper, the writ of habeas corpus will not apply to this category of detainees and is undoubtedly in the best interest of national security.

Category II detainees (being prosecuted by the United States for criminal offenses) can be held in state/federal prisons or military correctional facilities while awaiting trial by the Federal Courts under Article III. Holding detainees in state/federal prisons or military bases correctional facilities sends a positive message to the domestic and international community that they will be treated in the same humane manner as U.S. prisoners would be.

The American Bar Association believes that Article III courts are the preferred forum for trying detainees accused of criminal responsibility for the 9/11 attacks on the United States. We acknowledge that the president, the attorney general and the Department of Justice have discretion to determine whether to prosecute these alleged terrorists in federal court or before a military commission. The administration's decision to prosecute Khalid Sheikh Mohammed and other alleged terrorists in federal court are a sound one that the American Bar Association fully supports.<sup>54</sup>

Category III (transferred or released to a third country) detainees will continue to be handled in the same manner as before. The U.S. has already released 585 detainees to foreign countries and has recently instituted an agreement with the international world that there will be diplomatic assurances that a detainee, once released, will be treated humanely by foreign governments accepting the transfer.<sup>55</sup>

Domestic and international legal requirements may constrain the ability of the U.S. to transfer persons to foreign countries if they might face torture or other forms of persecution. Most notably, Article 3 of the U.N. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) and its implementing legislation prohibit the transfer of persons to countries where there are substantial grounds of believing (i.e., it would be ~~more~~ more likely than not') that they would be subjected to torture. The Bush Administration took the position that CAT

Article 3 and its implementing legislation did not cover the transfer of foreign persons held outside the U.S. in the war on terror. DoD has stated that, “it is the policy of the United States, consistent with the approach taken by the United States in implementing ... (CAT), not to repatriate or transfer GTMO detainees to other countries where it believes it is more likely than not that they will be tortured. When the transfer of a GTMO detainee is deemed appropriate, the U.S. seeks diplomatic assurances that the person will be treated humanely by the foreign government accepting the transfer.”<sup>56</sup>

This action of “checks and balances” now displays true concern for foreign policy and the interest of justice.

### Feasibility

U.S. officials must determine the legal, logistical, and security issues that may occur if a detainee would be transferred to the United States. President Obama’s order mandates the reviewing authorities determine the possibility to prosecute the detainees under the Article III of the Federal Court system.<sup>57</sup> With all cases going to United States Court of Military Commission Review being placed on hold, it allows the reviewing authorities to move forward in the placement of detainees in one of the three categories.<sup>58</sup>

Category I detainees determined not to stand trial will be placed in “preventive detention” to prevent them from returning to the battlefield. They will be sent to the U.S. for detention and will be released upon the cessation of hostilities.<sup>59</sup> During World War II (WWII), the U.S. established numerous camps within the U.S.

More than 150,000 men arrived after the surrender of Gen. Erwin Rommel’s Afrika Korps in April 1943, followed by an average of 20,000 new POWs a month. From the Normandy invasion in June 1944 through December 30,000 prisoners a month arrived; for the last few months of the war 60,000 were arriving each month. When the war was over, there were 425,000 enemy prisoners in 511 main and branch camps throughout the United States.<sup>60</sup>

There are several cities in the U.S. that are very interested in taking on the mission to hold detainees until their trial, release or cessation of hostilities”<sup>61</sup>.

The Standish, Michigan Maximum Correctional facility is due to be closed under a state prison reorganization plan due to budget cuts. The facility employs over 340 citizens in Standish County, with an unemployment rate of 17.3 percent. The security is more than adequate – five gun towers, 16-foot double chain-link fence, topped with razor-ribbon wire and monitored by a "state of the art" electronic detection system.”<sup>62</sup> Sen. Carl Levin (D) of Michigan, chairman of the Senate Armed Services Committee, said, on several occasions that he would support accepting detainees in Michigan if state and local officials agreed to it.”<sup>63</sup>

The Michigan Governor, John Engler is in favor of moving the detainees to Standish even if the correctional facility is designated as a federal prison and the guards do not come from the community. The worst case scenario is the town would have some sort of economic stimulus by receiving approximately \$36,000 per month for water and sewage fees from the facility. At this point, any money will help this town which posts a sign in front of the facility begging —See Our Town, Save Standish Max.””<sup>64</sup>

Category II detainees (being prosecuted by the United States for criminal offenses) would require a very secure and properly designed facility. One could broaden this category by replacing —Military Tribunals” with —Federal Courts”, since President Obama has placed the Military Commissions on hold and has recently had five detainees from GTMO tried in Federal Court. These detainees can be housed in state/federal prisons or military correctional facilities. Trials can be conducted in the Federal Courts under Article III. Article III Courts, with their time tested and proven due

process defense enhances the process to prosecute alleged terrorist.<sup>65</sup> There has been an initiative to create military joint correctional facilities. This initiative is a part of the Base Closure and Realignment Commission (BRAC). The premise is to consolidate military correctional facilities, eliminating each service from being required to man, equip, and budget for all service owned facilities. The U.S. can use some of these closed military facilities to house the detainees. The U.S. can also explore housing the detainees outside military bases either in federal or state prisons as mentioned above in Michigan.

Over seventy-three percent (585) of Category III detainees held at GTMO have been released or transferred to third countries and this can continue to be a viable and effective means.<sup>66</sup> In 2004, JTF-GTMO was tasked by SouthCom for the release of over twenty Pakistan detainees back into Pakistan. This release operation ran very smoothly and provided a “god will” action toward the country of Pakistan and the international community. This was the first of numerous release operations of detainees back to third countries and it is apparent that several hundred more have since been released.

#### Acceptability

61 of 600 known detainees that were released have returned back on the battlefield conducting terrorist acts. The number would increase significantly if we did not place some detainees in a preventive detention status.<sup>67</sup> The domestic and international community understands that the consequences and cost to keep detainees locked up until the conflict has ceased is in the best interest national security.

For Category II detainees, the rules governing Article III criminal trials are clear, as are the prevailing constitutional provisions.<sup>68</sup> The American Bar Association believes

that a verdict in an Article III court is more likely to inspire confidence among American citizens and be accepted by the international community than any determination by a military commission.”<sup>69</sup>

For Category III detainees, since 2002 almost 600 GTMO detainees have been transferred to a foreign country for continued detention or release.<sup>70</sup> Of those 600, 61 are back on the battlefield conducting terrorist acts.<sup>71</sup> Granted, taking everything into account, the U.S. may have had an inclination that some of the 61 would continue terrorist acts, yet it is very difficult to prove or convince to a foreign country that a detainee will continue to conduct terrorist acts. Additionally, there have been cases of detainees that returned to foreign countries which have been unlawfully detained and or tortured. The U.S. has established the domestic and international requirements to restore this issue. As mentioned earlier in the paper, the U.S. has established:

Article 3 of the U.N. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) and its implementing legislation prohibit the transfer of persons to countries where there are substantial grounds of believing (i.e., it would be ~~more~~ more likely than not) that they would be subjected to torture.<sup>72</sup>

For over eight years, the U.S. has been under attack by domestic and international governments for abuse and inhumane treatment. If the U.S. can effectively implement the (Article 3 CAT) it will codify that the U.S. is exhausting every means possible to comply with foreign policy and the interest of justice.

### Risks

The risks for Category 1 may raise a concern of unnecessary detention from human rights organizations and international/domestic governments. The debate whether to release, prosecute or just hold on to detainees can be very challenging for the U.S. However, the new policy to void the habeas corpus rights of detainees in this



hybrid war must justify to the domestic and international world why these detainees are being held, yet not being prosecuted or released.

The risks for the category 2 detainees could surface like in the case of Ahmed Ghalfan. The U.S. attempted to try him in federal courts, yet since allegations of torture to attain confessions or testimony against him, key evidence against him was thrown out by a Federal Judge.

The first GTMO detainee Ahmed Ghalfan was convicted in civilian court on one count of conspiring to destroy buildings and property in the 1998 terrorist bombings of the United States Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania. Expect conservatives to make much of Ghailani being acquitted on hundreds of other charges, but he still faces 20 years to life in prison.<sup>73</sup>

But because of the unusual circumstances of Mr. Ghailani's case after he was captured in Pakistan in 2004, he was held for nearly five years in a so-called black site run by the Central Intelligence Agency and at Guantánamo Bay, Cuba, the prosecution faced significant legal hurdles getting his case to trial and then winning the conviction. Prosecutors suffered a major setback when the judge, Lewis A. Kaplan of Federal District Court, barred them from using an important witness against Mr. Ghailani because the government had learned about the man through Mr. Ghailani's interrogation while he was in C.I.A. custody, where his lawyers say he was tortured.<sup>74</sup>

If a trial of the five alleged plotters becomes a platform for propagandizing by Al Qaeda members, or veers off course in an unexpected way, Obama is likely to be blamed. In the meantime, the administration must be prepared to communicate with angry family members of the 911 victims and fully explain that bringing the detainees to US soil is in the best interest of justice. Without a well trained and knowledgeable court system, danger in the statement below may arise.

This is all going to be about water boarding and talking about how they were tortured. Their lawyers are going turn these people into victims and will shift the focus to the treatment the defendants received, rather than the crimes they are alleged to have committed.<sup>75</sup>

The risks for Category 3 detainees are minimal. When the transfer of a GTMO detainee is deemed appropriate, the U.S. seeks diplomatic assurances that the person will be treated humanely by foreign government accepting the transfer from the —Article 3 CAT.”<sup>76</sup> This Article should prevent torture and unlawful detention of GTMO detainees being released to third countries and abides with U.S.’s policy and values.

- **OPTION 3: NATIONAL SECURITY COURT SYSTEM**

While numerous U.S. policies were put forth by President Obama, it is vital to shift the debate on detention operations. To date, the promotion has essentially been separated into two sides:

(1) Those who view the conflict with al-Qaeda as requiring a law enforcement response and thus civilian courts and the due process ordinarily accorded U.S. citizens; and (2) those who view the conflict as an armed conflict, believing the law of war paradigm to be appropriate for handling the detainees. Unfortunately, neither solution is working effectively. To say the least, this is an extremely difficult problem to address. This new armed conflict of the twenty-first century has shattered all previous notions of traditional warfare. Thus, neither paradigm fits neatly. Components of each paradigm are ideal to implement while others could never be successfully applied in the context of the al-Qaeda detainees.<sup>77</sup>

The rare environment of this conflict requires a unique temperament. Not only is the war itself a story, but the al-Qaeda fighters are unique as well—neither warrior nor criminal.”<sup>78</sup> Combining the use of the military commissions and the use of Article III courts it is feasible and a practical solution in adjusting to the changing environment.<sup>79</sup>

The detention and adjudication of these individuals needs to be similarly tailored to the current circumstances by utilizing a court that neither embraces the law enforcement model or the law of war model, but rather a hybrid of these two prevailing paradigms.<sup>80</sup>

## Suitability

The NSCS will be a court dedicated to hear cases of international terrorism and recommend a reasonable sensible solution from the problem the Obama administration has inherited. This method must and can act solely to attain, —justice, deterrence, abide to human rights responsibility, and provide civil liberties protections and maintain the support of our international partners, and gains national consensus.”<sup>81</sup>

The system created would be separate from existing Article III federal courts and military commission process. These Article III hybrid courts would co-exist with the traditional federal courts, the military commissions, and the courts-martial system.<sup>82</sup>

The U.S. already has specialized courts in the federal system of particularly complex issues requiring unique knowledge, including bankruptcy, patents, copyrights, taxation, and international trade. The U.S. has ample precedent for a security-oriented court dedicated to complicated issues requiring the development of substantive and procedural expertise.<sup>83</sup>

As the environment changes and stake holders shift domestically and internationally, so must strategic policy.<sup>84</sup> Technology, media, human rights, and domestic and international opinion have become a very powerful tool to apply pressure to acts of injustice or inhumane treatment. This policy must be transparent globally and articulate to the international world and a human rights group that not only does this provides a fair and speedy due process; it also ensures national security is not degraded.<sup>85</sup>

## Feasibility

This mixture of the military law style and the law enforcement style, respectively-- are suitably outfitted to fittingly come to the fragile stability of military law, intelligence needs, human rights obligations, and the need for justice in this hybrid war.”<sup>86</sup> —The

NSCS is a court dedicated to hear cases of international terrorism and provide the appropriate disposition of GTMO detainees called for in President Obama's Executive Order and speech at the National Archives by addressing not only the detention concerns, but also a means for prompt adjudication of cases."<sup>87</sup> This hybrid solution is an outline for the Obama administration to further the national security and foreign policy interests of the U.S. and the interests of justice."<sup>88</sup> The NSCS would be a court of trials and adjudicatory in nature to uphold the rule of law."<sup>89</sup>

To codify such a scheme would be to essentially bring the numerous GTMO problems into the U.S. The presumption should be to try all detainees captured. For those detainees who the President or military determine cannot (or should not) be tried for various reasons must be reserved as the exception to the norm rather than being an integral part of the any new system."<sup>90</sup>

The Department of Justice (DOJ), vice Department of Defense (DoD) should head up this system and watch over all prosecutions."<sup>91</sup> This will eliminate the perception of command influence which has been raised in the past by both the defense and prosecution teams."<sup>92</sup> — Having civilian oversight by Article III judges will send a strong signal of change."<sup>93</sup> The NSCS must have jurisdiction over U.S. citizens and non U.S. citizens, because it is critical not to discriminate when treating al-Qaeda detainees."<sup>94</sup> It is important to note point that:

Persons subject to the court, regardless of citizenship, are those alleged to be current or former members of al-Qaeda or affiliated groups that engaged or plan to engage in acts of international terrorism. Congress needs to clarify that the NSCS's jurisdiction does not cover — any terrorist," but only those who engage in international terrorism. This removes the fear of some that the court would have jurisdiction over any group or entity that engages in terrorism. The limited jurisdiction of the NSCS would serve as a check on any arbitrary use of the court system."<sup>95</sup>

To ensure that the right judges are placed with appropriate expertise, the NSCS will be chaired with — life-tenured" Article III judges with law of armed conflict

proficiency.<sup>96</sup> The appointment of these nine federal judges will be conducted in the same manner as any other federal judge.<sup>97</sup> Due to national security and interests, there will be no juries for these trials. It will consist of a three-judge panel with a two-to-one vote. ~~There~~ There will be two panels running consecutively, with the out of rotation judges handling any appeals.”<sup>98</sup>

However, these judges must have the background to ~~determine~~ determine the legality of intelligence gathering, terrorist surveillance and other necessary areas regarding terrorism and national security.”<sup>99</sup> As Andy McCarthy (former federal prosecutor) states:

Judges hearing cases within the existing federal criminal justice system tend to elevate individual rights at the expense of public safety (which is to say, at the expense of public’s collective rights). When opportunities for creativity present themselves—which frequently happens due to a pervasive elasticity in the rules governing judicial proceedings, over which judges have a degree of supervisory authority—judges are hard wired to err on the side of providing more process.<sup>100</sup>

Mr. McCarthy’s concern is understandable, because in the criminal justice system, the risk is not as excessive as it is with national security.<sup>101</sup>

The prosecutors will be earmarked by the Department of Justice National Security Division and would act for and prosecute for the government which will ensure that experienced and specific civilian —~~practitioners~~ practitioners” would handle these very important and sensitive —~~caseloads~~ caseloads.”<sup>102</sup> Additionally, military Judge Advocates (JAG) can be assigned as deemed necessary.<sup>103</sup>

The defense team would consist of ~~ten~~ JAG Officers from the Department of Homeland Security and the DoD.”<sup>104</sup> It is allowable for the accused to request civilian defense counsel at their own expense, which provides them the chance to hire a top defense counsel.<sup>105</sup>

Housing these alleged terrorist while waiting or during trials would be a very touchy subject. There are several options; (1) detain them at state or federal prisons that have been shut down due to lack of county or state funds. On 15 December 2009, the White House announced that they would purchase a closed down prison in Thomson, Illinois. “There is some concern that this facility could be a terrorist target for al-Qaida or what implications would occur if a detainee escaped.”<sup>106</sup>

### Acceptability

President Obama’s new vision is a move in the right direction; however his administration must now put his vision into action with clear and concise policy. The US has instituted other agencies since 9/11, yet it has failed to implement an effective legal system.<sup>107</sup>

Strategically we have created the Department of Homeland Security, broken the wall between the CIA and FBI intelligence arms, and created the Director of National Intelligence. Tactically, we have applied the surge in Iraq-and now in Afghanistan-by using new methods to carry out the war(s). It seems logical that we now must update our legal regime to best meet the relatively new threat of international terror posed by al-Qaeda and likeminded affiliates.<sup>108</sup>

The U.S. has released a list of possible U.S. military bases that could be used to house detainees-Camp Pendleton, CA; Fort Leavenworth, MO, and Marine Air Station, CA. These facilities can detain up to 250 detainees providing state of the art security, coupled with highly trained and supervised security personnel.<sup>109</sup> There could be two options in manning these facilities: (1) use military correctional specialists who are already certified in this Military Occupational Specialty (MOS); (2) use the units that have already conducted detention operations or will be designated to conduct detention operations at GTMO. Either way, there will be highly trained and supervised security element to man and equip for this mission.<sup>110</sup>

## Risks

There are minimal risks to this option. However, to establish this option, a separate institution solely dedicated to the National Security Court System must be stood up. Is the U.S. willing to concede budgeting for this Court System, while GTMO is already in place and the millions of dollars already vested for the Military Commissions in GTMO? Additionally, in a case like Ahmed Ghalfan's, since he was held at GTMO for such a long period of time and allegations of torture to attain confessions or testimony against him, key evidence was thrown out by a Federal Judge.<sup>111</sup> The NSCS must determine policy and procedures to handle such cases, however in past cases, all detainees on trial have been convicted and sentenced to life in prison.

However, for all future detainees straight from the battlefield, NSCS will provide a sound and effective judicial system. This will ensure that the sole focus of the trial will be alleged acts of terrorism, not due process and torture.<sup>112</sup>

## Recommendation

It is recommended that the National Security Court System be implemented. Several options are being considered by the Obama Administration, which include the continued use of the military commissions, as well as use of Article III courts. However, neither the military law style or the law enforcement style, respectively, ~~are~~ properly equipped to appropriately strike the delicate balance of military law, intelligence needs, human rights obligations, and the need for justice in this hybrid war."<sup>113</sup> A third approach--a court dedicated to hear cases of international terrorism is needed, the ~~National Security Court System~~".<sup>114</sup> ~~Legislatively~~ customized to meet the rare nature of the current conflict, the National Security Court System not only addresses the hybrid

nature of this conflict, but strikes a needed balance between the competing interests of U.S. national security and our human rights obligations to the detainees.”<sup>115</sup>

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